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IN THE

Supreme Court of the United States

No. 78-1466

PLY* GEM OF LAUREL, INC., et al.,
Petitioners,

v.

JOHN M. LEE, INC., et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED*

Petitioners' brief misconstrues the legal issue to which their writ is addressed. Petitioners wrongfully base their argument on a premise that is not entirely accurate. They would represent that "it is *undisputed* that said defendant . . . does (did) not transact business in that District when the action is commenced." (Emphasis added).

* References to the appendix on appeal to the District of Columbia Circuit are preceded by the letters "DA", followed by the page number, as attached to brief of Petitioners.

There is no justification for petitioners to state such a conclusion in the face of the footnote by the Court of Appeals that, because of their construction of Paragraph 12, they

> ". . . need not consider whether the award of franchise rights for a period commencing before but extending well beyond the date suit is filed, when made in exchange for a substantial fee, is itself the transaction of business after suit." DA-10

The recognition of this "presence" and "transacting" of business of petitioners by the appellate court belies any consideration that the status of the petitioners was undisputedly in their favor.

STATEMENT OF THE CASE

The Statement of the Case presented by petitioners is inaccurate and, from its omissions, misleading to the Court. Most particularly, petitioners have omitted from their statement all reference to the interweaving of contracts and dependency among the petitioners and between petitioners and respondents as a result of the existing franchise relationships. DA-2, 9, 10.

Petitioners continue their misstatement of facts when they avow that the cessation of business by "PGL" was made "in good faith". The "good faith" acts of the petitioners are what the litigation between them and the respondents is all about.

ARGUMENT BY RESPONDENTS

Petitioners seek certiorari because of alleged conflict among the courts over the verb tense of Section 12 of the Clayton Act. The Court of Appeals of the District of Columbia has been consistent in its interpretation of Paragraph 12, an interpretation that embraces that spoken by the United States Supreme Court in *Eastman Kodak Company of New York* v. *Southern Photo Materials Company*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed 684 (1927). Venue has been specially dealt with under the Clayton Act as against corporations. Moore's Federal Practice 2 Ed.p.1551. The Court of Appeals carefully analyzed the purpose of the venue provision of the Statute as well as the legislative intent in creating the language of Section 12. The Court of Appeals, in this case, spoke directly to the issue of the temporal frame of reference: the time when the cause of action arises (DA-15). Anything less in the application of Section 12 would open the door to the very abuses the section was intended to prevent. Section 12 is a remedial venue provision and, as such, is designed to broaden the concepts of venue application. Moore Federal Practice, 2 Ed. p.1552, 1556, and at 1557:

> "Thus, venue of an antiprust action is proper in any district where the corporation *has been* transacting business of any substantial character in a more or less permanent character." (Emphasis added.)

The citations relied upon by petitioners do not support their position. Rather, the majority view is that, since the 1966 amendment to Paragraph 1391(b), permitting plaintiff to lay the venue in the district where the claim arose, venue can be laid in such a district despite the fact that it would not meet other venue requirements. The language of the cases relied upon by petitioners speak to the past tense. Petitioners are careful to omit any reference to the franchise agreements between them and the respondents. The long-

term contracts did not—and cannot—disappear. The Court of Appeals considered it unnecessary to rule on the impact of these contracts on Section 12, having determined, and correctly, that the venue requirements of Section 12 were otherwise satisfied.

There is no basis for presuming that a conflict of interpretation of Section 12 exists. The cases and authorities have resolved any doubts in favor of the interpretation presented by the Court of Appeals.

CONCLUSION

The Petition for Writ of Certiorari does not satisfy the requirements for such a review. The petition should be denied.

Respectfully submitted,

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